IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

Crl.Rev.Pet.No. 626 of 2000(Y)

---

CC.27/1995 of CHIEF JUDICIAL MAGISTRATE COURT, TRIVANDRUM
DATED 23.6.2000

.....

REVN. PETITIONER(S):

---

GIRIJA, SOBHANA BHAVAN, T.C.49/1016,
IRRANIMUTTAM, MANACAUD,
THIRUVANANTHAPURAM NOW RESIDING AT
SURESH SAW MILLS, PARAVANKUNNU,
MANACAUD, THIRUVANANTHAPURAM.

BY ADV. SRI.GOPAKUMAR R.THALIYAL

RESPONDENT(S):

---

1.K.PRABHAKARAN, PRIPRIETOR,
PRABHA INTERNATIONAL EXPORTERS,
MANACAUD P.O., THIRUVANANTHAPURAM 695 009.

2. MEERA ALIAS NEENA, AGED 32, PRABHA INTERNATIONAL
EXPORTERS, -DO-

3. STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

ADV. SRI.P.GOPALAKRISHNAN NAIR FOR R1&2
PUBLIC PROSECUTOR SRI.C.K.SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 09/04/2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**K.HEMA, J.**

**----------**

**CRL.R.P.NO.626 of 2000**

**----------**

**Dated this the 9th day of April, 2007**

**O R D E R**

Revision petitioner filed a complaint against first respondent-husband and the second respondent on the averments that she is legally wedded to first accused and their marriage was conducted in accordance with the religious rites. They lived together as husband and wife and four children were born in the wedlock. While so, during the subsistence of the said marriage, first respondent married second respondent and they registered the marriage at the Registrar's Office. Both of them were aware that first marriage was in subsistence. In such circumstances, both the accused committed offence under Section 494 IPC.

2. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may

extend to seven years, and shall also be liable to fine under Section 494 IPC. The said section does not extend to such persons as referred to in Exception to Section 494 IPC.

3. Complainant-revision petitioner adduced evidence in support of the prosecution. PW1 to PW3 were examined. The accused cross-examined the witnesses. Exhibit D1 was marked on behalf of accused. The Magistrate, upon taking all the evidence, referred to in Section 244 of the Code of Criminal Procedure ('the Code', for short), found that complainant failed to bring out a prima facie case against the accused for framing charge under Section 494 IPC and hence accused were discharged. The said order is under challenge.

4. Heard. Perused records and the order of discharge. It is seen from the impugned order that court committed an illegality in not considering whether requirements under Section 245(1) of the Code are satisfied or not. Section 245(1) lays down that if, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if

unrebutted, would warrant his conviction, the Magistrate shall discharge him.

5. So, what is to be looked into by the court under Section 245(1) of the Code is whether from the matters placed before the court, a case is made out against accused, which if “unrebutted” would warrant in conviction. As per Oxford Advanced Learner's Dictionary-New 7th Edition, 'rebut' means “to say or prove that a statement or criticism is false”. Therefore, 'rebut' in the present context means to prove that the allegations levelled against the accused are false. An allegation can be proved to be false by proving that such allegation do not exist. In other words, those are “disproved”.

6. The expression “disprove” is defined in the Evidence Act. As per Section 3 of the Evidence Act, a fact is said to be “disproved” when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

7. So, at the stage of Section 245(1) of the Code, the court has to look into the following facts : (i) Whether evidence adduced under Section 244 of the Code makes out a case against accused (ii) Whether such case, if not proved to be false, would warrant his conviction. If both are answered in the affirmative, the court shall not discharge the accused. If the evidence adduced under Section 244 of the Code discloses a case and if such case remains not disproved, a conviction is warranted, the court shall not discharge the accused.

8. An accused can be discharged only if the evidence adduced under Section 244 does not make out any case at all, if remains not disproved or not proved to be false, would warrant his conviction. On going through the records, I find that three witnesses were examined under Section 244 of the Code. All the three witnesses deposed that the marriage between the first and the second accused was a registered marriage. PW2 and PW3 were not cross examined on this point. PW3 is the son of the first accused. He said that he had even seen the first and second accused getting married in the

Registrar's office and the Registrar stating that the accused were being 'married'. This fact was also not cross examined or challenged.

9. The trial court ought to have considered whether evidence adduced in this case makes out a case, if not proved to be false would warrant conviction of accused. This was not done. Learned Magistrate held that in order to constitute a valid marriage, certain ceremonies have to be gone through in accordance with the custom of the community to which the parties belonged. In the present case the parties are Hindus governed by the Hindu Marriage Act, it is observed. Therefore, the trial court found that invocation before the secred fire and Sapthapati are necessary for solemnization of the marriage between the accused 1 and 2, to attract offence under Section 494 IPC.

10. There is absolutely nothing in record to show that the accused are Hindus. PW1 to PW3 have not stated that they are Hindus. The evidence adduced in this case does not disclose that the parties are Hindus. The court has entered findings

contrary to evidence adduced that the parties are Hindus and the invocation before the sacred fire and Sapthapati are necessary etc. May be, they are Hindus, but what is to be looked into is what the evidence discloses and whether evidence discloses a case which, if not proved to be false, would warrant conviction of accused.

11. It is also held that the complainant admitted that the marriage between accused 1 and 2 is a registered marriage and a registered marriage is not valid marriage at all and that it is only an agreement between the parties to live together. Here also, the court below has gone wrong. None of the witnesses examined in the case stated that the marriage between accused 1 and 2 was as per an agreement to marry. It has not been brought out in the cross examination that the registration of the marriage was by registering a marriage agreement.

12. The trial court also found that the alleged marriage between first and second accused was solemnized after passing an ex parte decree of divorce in the case filed by first accused against the complainant. This finding is also not supported by

evidence. It is true that PW1 admitted that there was an ex parte decree of divorce. The case was taken up on file again after setting aside the ex parte decree and as per evidence, the marriage subsists. It is not in evidence that marriage between the first and second accused which is alleged to have taken place on 13.3.1992 was conducted while ex parte divorce decree was in force. The court cannot presume that the marriage was conducted when the ex parte decree was in force. The relevant dates are not brought out in evidence.

13. In such circumstances, court grievously erred in discharging the accused, without applying its mind to relevant facts. Hence, the order under challenge is liable to be set aside. The trial court shall reconsider the matter and see whether court can discharge the accused or not, as required under Section 245(1) of the Code, untrammelled by any of the observations made in this order on the facts of this case. I have only pointed out that certain findings does not appear to be on the basis of evidence.

14. In the result, following order is passed :

(i) The order under challenge is set aside.

(ii) The case is remanded to the trial court for fresh consideration and disposal in accordance with law, after serving notice to counsel for both sides.

This petition is allowed.

K.HEMA, JUDGE.

vgs